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No. 81-2138

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SARAH LINDA PARKER, *et al.*,
Petitioners,

vs.

JUDITH K. ANDERSON, and
BELL HELICOPTER COMPANY, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF BELL HELICOPTER TEXTRON IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May counsel representing a plaintiff class agree to a settlement which provides for a fixed sum of money to cover both back pay for the class and attorney's fees where the settlement agreement fixes the formula by which the money is to be distributed to individual class members and provides that the amount of fees, if any, to be subtracted from the settlement fund is to be determined exclusively by the Court?

2. May experienced counsel appointed by the Court to represent absent class members conclude a settlement of the absent class members' claims without the consent of all the named plaintiffs, whose claims were not included in the settlement?

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STATEMENT OF THE CASE

These consolidated cases involve allegations that defendant Bell Helicopter Textron ("Bell") discriminated against blacks on the basis of race and against women on the basis of sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* The first of the consolidated complaints was filed on March 5, 1975, and a plaintiff class was certified on April 21, 1978. On April 18, 1980, a proposed settlement of all class claims and motion for approval was submitted to the District Court, the Honorable Eldon B.

Mahon, Judge. The District Court held an evidentiary hearing on October 16-18, 1981. The Court issued a memorandum opinion and order approving the settlement on March 10, 1981. On April 10, 1981, the District Court ordered the entry of a final judgment on the class claims. This order was affirmed by the United States Court of Appeals for the Fifth Circuit on February 18, 1982.

This litigation began in earnest on April 19, 1977, when the District Court conditionally consolidated and certified a class in five pending Title VII actions against Bell.[1] The consolidation order set the procedural ground rules under which the cases moved toward final class certification[2] and trial. One of the more significant procedural provisions was the appointment of Howard A. Specter as lead counsel for the class. The District Court endowed upon Mr. Specter "primary responsibility" for directing the plaintiffs' case. The Court expressly made Mr. Specter responsible "for providing fair representation to all members of the conditionally certified and consolidated class." Order of April 19, 1977, *Parker v. Bell Helicopter Co.*, Civil Action No. 4-75-61-E (N.D. Tex.) (Conditionally Consolidated).

After more than two years of extensive discovery and several unsuccessful attempts by Bell to exclude from the class applicants, nonunion employees, and employees at its Amarillo facility, a trial on all issues of class liability was scheduled to commence on Monday, March 3, 1980. On February 6, 1980, the parties gathered in Judge Mahon's courtroom for a pretrial conference. No one had reason to expect, at that time, that the case would settle. Several earlier settlement discussions had died at an early stage, and the parties had virtually completed their trial preparation. A trial consuming approximately 20 business days was predicted.

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[1] One of the consolidated cases, *EEOC v. Bell Helicopter Co.*, Civil Action No. CA 4-75-249, was subsequently dismissed. Complaints by Judith Anderson and Nathaniel Rodgers were consolidated with the four remaining actions on October 11, 1978 and October 18, 1978.

[2] The conditional certification of April 17, 1977 was solely for purposes of discovery prior to a full hearing on class certification.

At the February 6 conference, Judge Mahon expressly counselled the parties, in strong language, to attempt to reach a settlement. In deference to this request, the parties met later that evening. As often occurs when a major trial looms large on the horizon, these discussions bore fruit. On Friday, February 29, 1980, Mr. Specter, on behalf of the class, and Stephen N. Shulman, on behalf of Bell, signed a letter setting forth the outline of a mutually acceptable consent decree. For the first time, likely settlement of the case became a reality.

The February 29 letter agreement included, at Bell's insistence, a provision that final settlement of the class claims be contingent, at Bell's option, upon settlement of the claims of each of the eleven named plaintiffs. Bell pursued this all or nothing approach to effect an important consideration in any settlement — putting an end to the entire litigation. This contingency, however, granted to the named plaintiffs a perceived veto power over the total settlement which produced highly inflated individual demands on their part.[3] When it became apparent that the plaintiffs were attempting to use their individual claims in that fashion, Bell reassessed its position. It decided that settlement as to the class only would be advisable despite a continuation of the individual claims.

On April 21, 1980, a proposed consent decree and motion for approval were filed with the District Court. The decree, which provided that Bell denied all liability and wrongdoing whatsoever, proposed that the proceeds of a $1,250,000 certificate of deposit purchased by Bell on March 3, 1980 be distributed to the class, in accordance with a prescribed formula, and to plaintiffs' counsel, in an amount to be determined by the Court. In addition, Bell agreed to several affirmative undertakings valued at approximately $1,000,000.

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[3] For example, Mr. Mackey demanded $100,000, Mr. Odom $84,000, Ms. Parker $70,000, Ms. Jackson $50,000, and Ms. Haynes $50,000. In addition, these same plaintiffs requested promotions and pension plan adjustments. Mr. Mackey and Mr. Odom also jointly requested that they receive a $56,660 award of attorney's fees and costs from the settlement fund to compensate them for services they provided to the class.

Upon becoming aware that most of the named plaintiffs wished to oppose the settlement of the class claims, the District Court appointed Charles Padorr to represent dissenting class members. After distributing notice to the class and providing Mr. Padorr several continuances to conduct discovery and to review the record, the District Court scheduled a hearing on the settlement proposal for October 16, 1980. The Court ordered Bell to analyze the responses to the notice and report the precise magnitude of the objections to the settlement and of claims on the settlement fund prior to the hearing.

Among the witnesses at the settlement hearing was Dr. Charles Mann, the plaintiffs' expert statistician. Dr. Mann had, in preparation for trial, examined and manipulated the data in Bell's computerized personnel files. The unedited computer tapes containing this data had been turned over to plaintiffs' counsel during discovery. Dr. Mann stated that, in light of this data, the plaintiffs' case was "not particularly strong." (App. B-19).

The objectors did not come forward with any evidence suggesting that Dr. Mann's analysis was overly pessimistic. Indeed, Mr. Padorr rejected Mr. Specter's invitation to examine the plaintiffs' evidence.

After full briefing, both before and after the hearing, and three days of live testimony, the District Court found the settlement to be fair, reasonable, and adequate. The Court generally discounted the named plaintiffs' objections, finding, after carefully observing them testify, that the plaintiffs held their own interests paramount to those of the class. The Court stated as a finding of fact,

> Plaintiff-objectors opposed the settlement in bad faith, primarily to gain leverage in settling their individual claims against Bell at exorbitant figures. Although there were obvious difference [sic] of degree among the plaintiff-objectors, their opposition to the settlement was a product of disappointment and greed rather than a dispassionate evaluation of the settlement against the risks and expense of pressing on with the litigation. (App. B-22).

REASONS FOR DENYING THE PETITION

I. There Is No Conflict In The Courts Of Appeals Concerning Attorney's Fees.

Petitioners' contention that Mr. Specter improperly negotiated his fee as part of the settlement is without substance. *See* Petition for Writ of Certiorari, 7-12. The simple fact is that Mr. Specter did not negotiate a fee at all. The amount of Mr. Specter's and associate class counsels' fee was left entirely to the discretion of the District Court.

The Court of Appeals did not, as Petitioners now assert, rule that the amount of a fee award is the sole measure of its reasonableness. *See* Petition for Writ of Certiorari, 8. Quite to the contrary, the Court of Appeals required that the adequacy of the entire settlement be evaluated with sensitivity toward the potential for counsel to trade off class relief in exchange for a fee and stressed that, in this case, the District Court had complete control over the fee awarded. (App. A-16).

The cases relied on by petitioners do not suggest a different rule. *Prandini v. National Tea Co.*, 557 F.2d 1015 (3d Cir. 1977), and *Mendoza v. United States*, 623 F.2d 1338 (9th Cir.1980), *cert. denied*, 450 U.S. 912 (1981), both involve a fixed agreement by the parties as to the division of the settlement fund between back pay and attorney's fees. Such agreements raise the prospect that the defendant could substantially decrease its payment to the class by offering plaintiffs' counsel a sizeable fee. Here, where no portion of the fund was specifically earmarked for attorney's fees, that phenomenon could not occur.

An immutable requirement that attorney's fees not be addressed until after approval of a back pay settlement would also represent bad policy. It is extremely difficult for a defendant to agree to a back pay settlement when its obligation for attorney's fees remains open. The very purpose of a settlement is to liquidate the potential liability associated with a lawsuit. The procedure used to settle this case should, if anything, be encouraged.

II. Negotiation Of A Fair, Adequate, And Reasonable Class Settlement By Class Counsel Constitutes Adequate Representation.

There can be no doubt that Mr. Specter was to negotiate a settlement of the class claims. Such conduct was fully consistent with Mr. Specter's mandate as lead counsel and with the Court's express instructions at the pretrial conference. Indeed, it is difficult to conceive how Bell could have refused to conduct negotiations with Mr. Specter. By the same token, Mr. Specter was empowered to agree to a settlement, once negotiated, on behalf of the absent members.

Petitioners' entire argument is based on the mainfestly incorrect premise that their position as class representatives permitted them to control the course and outcome of settlement negotiations. *See* Petition for Writ of Certiorari, 12-23. The proposition that class representatives may veto a settlement has been rejected by every Court of Appeals to consider the issue. *See, Kincade v. General Tire and Rubber Co.*, 635 F.2d 501, 508 (5th Cir. 1981); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1216 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979); *Flinn v. Fmc Corp.*, 528 F.2d 1169, 1174 n.19 (4th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976); *Saylor v. Lindsley*, 456 F.2d 896 (2d Cir. 1972). As stated by the Court of Appeals for the Second Circuit, "[T]he assent of the plaintiff (or plaintiffs) who brought a derivative stockholder's action is not essential to a settlement; a contrary view would put too much power in a wishful thinker or a spite monger to thwart a result that is in the best interests of the corporation and its stockholders." 456 F.2d at 889-900.

In this case, the settlement does not even include the individual claims of the named plaintiffs. If class counsel has the authority to settle all class claims, including those of the representatives, over the representatives' objections, surely Mr. Specter acted properly in severing the named plaintiffs' claims and reaching a settlement for the absent class members alone. Whatever rights the named plaintiffs had to be informed of and to comment on the settlement were more than satisfied by their involvement in the process after completion of the February 29

letter agreement and by the formal settlement approval process, which afforded the named plaintiffs full discovery rights and a hearing.

The ultimate measure of the adequacy of class counsel's representation is the adequacy of the settlement itself. And the single most important indicium of adequacy is the likelihood that plaintiffs could have achieved significantly better results by going to trial. *See Armstrong v. Board of School Directors of City of Milwaukee,* 616 F.2d 305, 314 (7th Cir. 1980); *Cotton v. Hinton,* 559 F.2d 1326, 1330 (5th Cir. 1977). Not only did the District Court, in accordance with the testimony of plaintiffs' expert, conclude that the likelihood of a better result was slight, but the named plaintiffs made no effort whatsoever to demonstrate any strengths in the class case. For all the named plaintiffs' complaints about the quantity and quality of the statistical data class counsel provided to them during the settlement negotiations, neither the named plaintiffs nor Mr. Padorr ever set foot in Mr. Specter's office to examine the evidence.

CONCLUSION

For the reasons stated above, the petition should be denied.

Respectfully submitted,

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